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**IN THE
COURT OF APPEALS OF INDIANA**

ANTHONY JOHNSON,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A02-0607-CR-573

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0511-FA-202279

May 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Anthony Johnson appeals his conviction for child molesting as a class A felony.¹ Johnson raises one issue, which we revise and restate as whether the preindictment delay constituted fundamental error. We affirm.

The relevant facts follow. Johnson and Jessie Johnson are the parents of A.J., who was born on May 1, 1989. Johnson and Jessie were not married, and A.J. would usually stay with Johnson during summer and Christmas vacations. In 2000, when A.J. was ten years old, she stayed at Johnson's house. Johnson told A.J. to get ready for bed. At some point after A.J. had fallen asleep, Johnson awakened A.J. Johnson had his pants around his knees and took off A.J.'s panties. Johnson lay on his side, forced A.J. to get on her side, and inserted his penis into A.J.'s vagina. A.J. told her mother about what had happened. A.J.'s mother called the police and took A.J. to the hospital, where a doctor examined A.J. A.J. and her mother talked with a detective.

On November 23, 2005, the State charged Johnson with one count of child molesting as a class A felony and one count of child molesting as a class C felony.² On December 12, 2005, the State filed a notice of discovery compliance, which indicated that a copy of a physician's report of A.J. had been forwarded to Johnson's counsel. After a trial, the jury found Johnson guilty of child molesting as a class A felony and not guilty

¹ Ind. Code § 35-42-4-3 (2004).

² Ind. Code § 35-42-4-3 (2004).

of child molesting as a class C felony. The trial court sentenced Johnson to thirty years and suspended five years.

The sole issue is whether the preindictment delay constituted fundamental error. Johnson failed to object to the lapse of time and has waived any challenge to the timeliness of prosecution. Koke v. State, 498 N.E.2d 1326, 1331 (Ind. Ct. App. 1986) (“A challenge to the timeliness of prosecution must be raised by a motion to dismiss prior to the conclusion of trial or the issue is waived.”); see also Ind. Code § 35-34-1-4(a)(8) and (b) (2004). Johnson attempts to avoid waiver by arguing that his right to due process was denied thereby creating fundamental error. “Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue.” Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). It is error that makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. Id.

The Due Process Clause of the Fifth Amendment protects defendants against excessive preindictment delay. Marshall v. State, 832 N.E.2d 615, 626 (Ind. Ct. App. 2005) (relying on U.S. v. Marion, 404 U.S. 307, 324, 92 S. Ct. 455, 465 (1971)). Generally, criminal charges filed within the statute of limitations are considered timely. Johnson v. State, 810 N.E.2d 772, 775 (Ind. Ct. App. 2004), trans. denied. “Nonetheless, even where a charge is brought within the statute of limitations, the particulars of the case may reveal that undue delay and resultant prejudice constitute a violation of due process.” Patterson v. State, 495 N.E.2d 714, 718 (Ind. 1986). “However, the mere passage of time

is not presumed to be prejudicial, and it is the defendant's burden to prove that undue prejudice arises from the delay." Id. To satisfy the threshold burden of prejudice, a defendant must make specific and concrete allegations of prejudice that are supported by the evidence. Allen v. State, 813 N.E.2d 349, 366 (Ind. Ct. App. 2004) (relying on U.S. v. Spears, 159 F.3d 1081, 1084 (7th Cir. 1998), reh'g denied, cert. denied, 528 U.S. 896, 120 S. Ct. 228 (1999)), trans. denied. In other words, "if the prosecution deliberately utilizes delay to strengthen its position by weakening that of the defense or otherwise impairs a defendant's right to a fair trial, an inordinate pre-indictment delay may be found to violate a defendant's due process rights." Johnson, 810 N.E.2d at 775. Therefore, to obtain relief, the defendant must show that: (1) he suffered actual and substantial prejudice to his right to a fair trial; and (2) the State had no justification for the delay. Id.; see also Allen, 813 N.E.2d at 366.

A. Prejudice

Johnson argues that he was prejudiced because: (1) he was denied the opportunity to present a report on the medical examination of A.J.; and (2) he was unable to answer questions because of the passage of time.

1. Medical Report

Johnson argues that "[b]ecause Detective Dutrieux did not locate a report on the medical examination that A.J.'s mother claimed had been allegedly performed, Johnson was denied to [sic] opportunity to present evidence that might have been exculpatory." Appellant's Brief at 9. Johnson also argues that "[i]f the report had contained evidence

against Johnson, the prior investigating detective would have likely pursued charges or at the very least, either placed a copy of the report in the file or summarized the exam results in a report or memorandum.” Id.

The record reveals that A.J.’s mother called the police and took A.J. to the hospital, where a doctor examined A.J. The State points out that on December 12, 2005, the State filed a notice of discovery compliance that indicated that a copy of a physician’s report of A.J. had been forwarded to Johnson’s counsel. The State argues that if Johnson believed that the medical report contained exculpatory evidence, he could have admitted the report. Because the record reveals that Johnson received a physician’s report of A.J. and Johnson does not make any argument about this report, we cannot say that Johnson has made specific and concrete allegations of prejudice that are supported by the evidence. Accordingly, we cannot say that he was prejudiced because he was denied the opportunity to present evidence that might have been exculpatory.³

2. Whether A.J. was in Johnson’s Residence

Johnson also argues that “because of the delay in prosecution, Johnson was unable to answer the question of whether A.J. had been at his home at the time the alleged molestation occurred.” Appellant’s Brief at 9. The mere allegation that the passage of

³ Johnson filed a motion to strike the State’s appendix, which contains a physician’s report and social worker’s dictation. Johnson argues that these documents were not part of the record on appeal. Because we did not consider the State’s appendix on appeal, we consider Johnson’s motion to strike the State’s appendix moot and deny it.

time operated to impair the memories of witnesses is insufficient to show prejudice. See Plowman v. State, 604 N.E.2d 1219, 1221 (Ind. Ct. App. 1992) (“The mere allegation that the passage of time operated to impair the memories of witnesses is insufficient to show Plowman’s defense was hampered by the pre-arrest delay.”); McMorris v. State, 181 Ind. App. 519, 523, 392 N.E.2d 820, 823 (1979) (holding that defendant’s claim of impaired memory on his part as well as on the part of those of his friends and relatives whom he had contacted does not sufficiently demonstrate prejudice).

In summary, we conclude that Johnson was not prejudiced because he was denied the opportunity to present exculpatory evidence or because of his impaired memory. Because Johnson has not shown the he was prejudiced, we need not address whether justification for the delay existed. Thus, we conclude that Johnson has failed to demonstrate fundamental error.

For the foregoing reasons, we affirm Johnson’s child molesting as a class A felony.

Affirmed.

SULLIVAN, J. and CRONE, J. concur